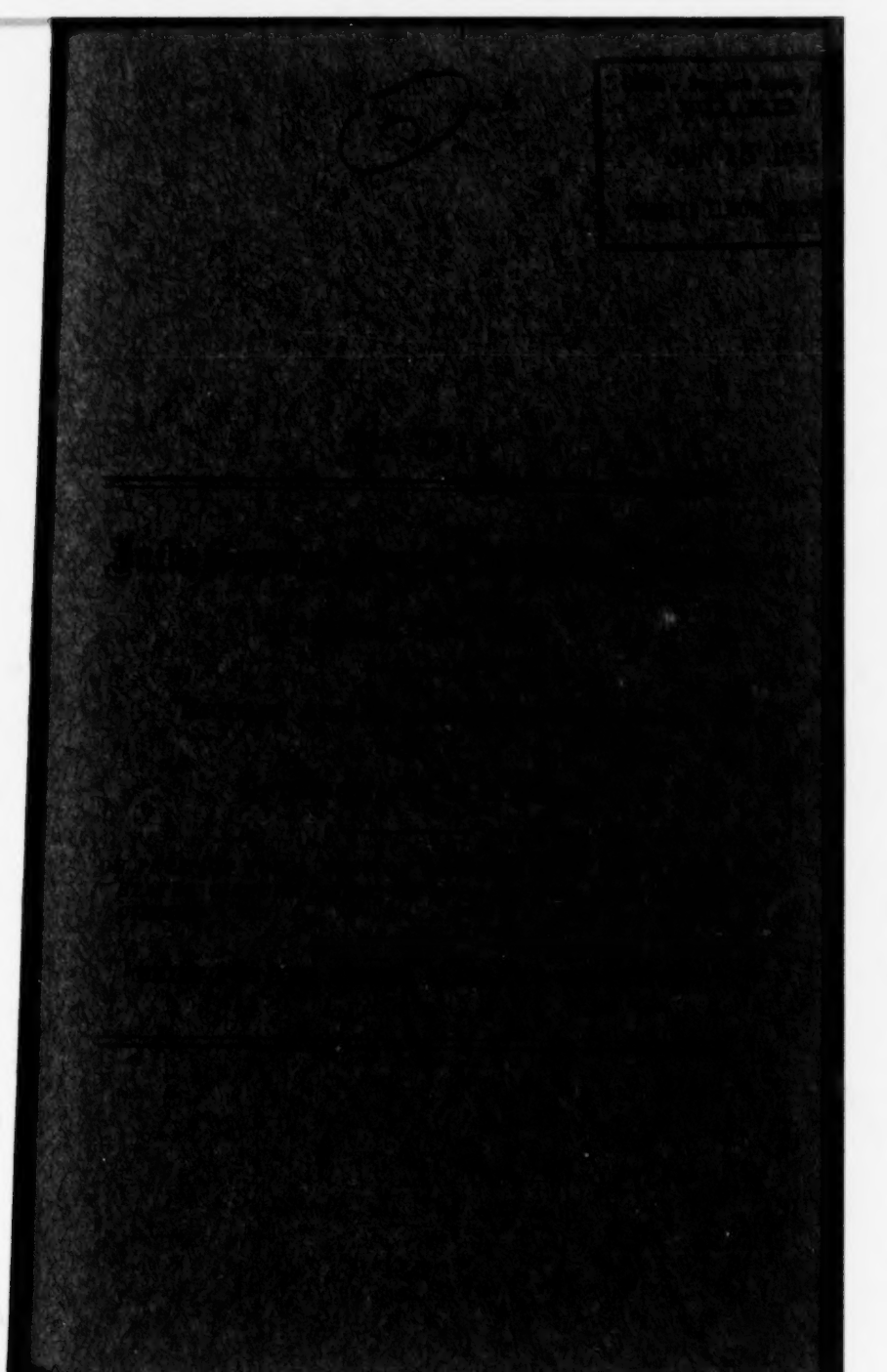

# INDEX



## CITATIONS





649552—45——1

# In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1314

RICHARD ADOLPH ASCHER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the circuit court of appeals (R. 63–65) is reported at 147 F. 2d 544. The opinion and the findings of fact and conclusions of law of the district court (R. 45–59) are not reported.

### JURISDICTION

The judgment of the circuit court of appeals was entered March 1, 1945 (R. 66). The petition for a writ of certiorari was filed May 26, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTION PRESENTED

Whether the evidence is sufficient to support the judgment of the district court revoking petitioner's naturalization on the grounds that it had been fraudulently and illegally procured.

### STATUTES INVOLVED

Section 338 of the Nationality Act of 1940, c. 876, 54 Stat. 1137, 1158, 8 U. S. C. 738, provides in part:

> (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings * * * for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

Section 4 of the Act of June 29, 1906, c. 3592, 34 Stat. 596, 598, formerly 8 U. S. C. 382 (1926 ed.), which was in force at the time of petitioner's naturalization, provided in part:

> It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time

> he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record.

**STATEMENT**

Proceeding under Section 338 of the Nationality Act of 1940, the United States Attorney for the Eastern District of New York on February 1, 1943, brought suit in the District Court for his district to cancel the certificate of naturalization issued to petitioner, a native of Germany, by the Supreme Court of New York, Kings County, on April 15, 1920. The complaint charged that the certificate had been procured fraudulently and illegally. It was alleged that petitioner's testimony under oath at a hearing before a naturalization examiner on November 6, 1919, that he had not been previously arrested for or convicted of any violation of law other than speeding, was wilfully and knowingly false; that A. Wells Stump, one of the witnesses to his petition for naturalization, was not competent for that purpose; and that he had not behaved as a person of good

moral character during the five year period preceding the filing of his petition for naturalization. (R. 3–6.) In his answer, petitioner denied these charges, but conceded, as alleged in the complaint (R. 4), that at an examination before a naturalization examiner in 1942 he admitted that he had been arrested and convicted of forgery in New York in 1913, as a result of which he served eighteen months in a reformatory and was thereafter released on parole, and also that he had told this examiner that he had known Stump for about two years, "thereby intending to convey that he had known said A. Wells Stump from a date about two years prior to 1915" (R. 6–7). Petitioner also alleged that at his examination on November 6, 1919, he stated to the examiner that during the five years prior thereto he had been arrested only for speeding, for which he was fined $25 (R. 7).

The evidence adduced at the trial may be summarized as follows:

Petitioner was born in Germany in 1886 and came to the United States in May 1906. On February 5, 1913, he filed a declaration of intention to become a citizen, and on November 6, 1919, he filed a petition for naturalization in the Supreme Court of New York, Kings County. That court issued him a certificate of naturalization on April 15, 1920. (R. 13, 35.)

On November 6, 1919, the same day petitioner filed his petition, he was examined under oath by

Samuel D. Levy, a naturalization examiner (R. 39–40). Levy did not testify at the trial below, since he had severed his connection with the Naturalization Service in 1920, and his whereabouts were unknown (R. 14). Over petitioner's objection, there was received in evidence a document called an "Admittance Slip" (R. 16), identified by one Stitzer, an official of the Naturalization Service since 1908, as a record of Levy's examination of petitioner on November 6, 1919, which Stitzer testified had been "kept in the files" of the Service in the regular course of business (R. 11–12, 14–16). On this document there appeared the notation "NCR," and below it a statement that petitioner had been "Arrested about 1 year ago for speeding and was fined $25" (R. 12). Stitzer testified that the letters NCR meant that the applicant for citizenship had no criminal record, and that the naturalization examiner obtained such information by questioning the applicant (R. 17). It was admitted that petitioner had, in fact, been convicted of second degree forgery in the Court of General Sessions of the County of New York on September 3, 1913, and sentenced to an indeterminate term of imprisonment, and that he served 18 months in the state reformatory and about six months on parole after his release (R. 13, 36–37). At an examination of petitioner before a naturalization examiner in July 1942, a transcript of which was introduced by the Government (R. 19, 34–35), petitioner testified that at

his examination in 1919 he possibly did tell the examiner of his arrest and fine for speeding, but that he did not disclose the forgery conviction and sentence or his imprisonment therefor, for the reason that the examiner did not question him as to his criminal record (R. 40–41).

At the 1942 examination, petitioner also testified that he had known Stump, one of the witnesses to his petition for naturalization, "a couple of years," more or less, prior to November 6, 1919, when he applied for naturalization (R. 41).

Stump and petitioner's wife testified in petitioner's behalf. Stump stated that he first met petitioner in May 1913 and saw him again in July of that year, but that he did not see petitioner again until July 1915, after which time he saw him once or twice each week (R. 22–24, 26, 27–28, 31). Stump also testified that when petitioner applied for citizenship in 1919, he did not know that petitioner had been in jail in 1913 and 1914 (R. 28, 30). Petitioner's wife testified that she and her husband first met Stump in 1913 (R. 32).

The district court filed a memorandum opinion (R. 45–51), and findings of fact and conclusions of law (R. 51–59). The court concluded, *inter alia,* that the evidence was clear, unequivocal and convincing that petitioner deliberately and intentionally concealed the fact of his forgery convic-

tion on his examination before Levy on November 6, 1919, and, therefore, that his naturalization was fraudulently procured; and also that the evidence was clear, unequivocal and convincing that Stump was not a qualified witness to petitioner's naturalization in that he was unable to verify continuous residence by petitioner, as required by law, or that petitioner had been a person of good moral character during the five years preceding the filing of the petition for naturalization, and, therefore, that petitioner's naturalization was illegally procured (R. 58). Accordingly, the court entered a decree setting aside the order admitting petitioner to citizenship and canceling his certificate of naturalization (R. 59–60).

On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was affirmed (R. 66). The court pretermitted the issue of illegality in the procurement of petitioner's naturalization, holding that the proof established that he had fraudulently concealed from the examiner in 1919 the fact that he had been convicted of forgery (R. 63–65).

## ARGUMENT

Relying upon *Schneiderman* v. *United States*, 320 U. S. 118, and *Baumgartner* v. *United States*, 322 U. S. 665, petitioner's sole contention (Pet. 5, 8–22) is that the evidence is insufficient to support the findings that his naturalization had been fraudulently and illegally procured. We

submit, however, that the proof fully satisfied the exacting standard laid down in those decisions.

1. The ultimate finding of the district court on the question of fraud was that petitioner had deliberately concealed his prior conviction of a felony on his preliminary examination in 1919 and that his purpose in doing so was to obtain citizenship (Finding 29, R. 54). It is settled that naturalization will be revoked on the ground of fraud where the applicant concealed his past criminal record, since such concealment serves to prevent a full inquiry as to whether he behaved as a person of good moral character during the five year period preceding the filing of his petition. *United States* v. *De Francis*, 50 F. 2d 497, 498 (App. D. C.); *United States* v. *Saracino*, 43 F. 2d 76 (C. C. A. 3); *Gaglione* v. *United States*, 35 F. 2d 496 (C. C. A. 1), certiorari denied, 281 U. S. 721; *United States* v. *Mancini*, 29 F. Supp. 44 (M. D. Pa.); *United States* v. *Etheridge*, 41 F. 2d 762 (D. Ore.); cf. *Rein* v. *United States*, 69 F. 2d 206 (C. C. A. 3).

Although admitting that he was questioned by the examiner on his preliminary examination and that he failed to disclose the forgery conviction and sentence, and even that the record of his preliminary examination affords a basis for an inference that he was asked some questions concerning convictions for crime, petitioner argues that the notation "NCR" appearing in that record

and the further statement that he had been arrested and fined for speeding about one year prior to his examination, do not support an inference that he was asked specifically whether "he had *ever*[1] been convicted of a crime in his lifetime," because under the statute the examiner's questions in this regard could have been limited in point of time to the five year period preceding the filing of his petition. Since his conviction of forgery actually occurred more than five years prior to that time, he contends that there was no clear and convincing proof that he deliberately concealed the fact of his conviction from the examiner. (Pet. 8–13.) This contention, we submit, represents a highly artificial and improbable interpretation of the evidence. The obvious and logical inference to be drawn from the notation that petitioner had no criminal record and the affirmative statement that he had been arrested and fined for speeding, is that the examiner questioned him generally, without regard to time, as to whether he had a criminal record and that, with the exception noted, petitioner replied in the negative. This inference is further supported by the consideration that even though an applicant has not been convicted of crime during the five years preceding his petition, his criminal record beyond that period is directly relevant to

[1] Italics as in the petition for certiorari, p. 11.

the determination of his moral character during the period. *In re Taran*, 52 F. Supp. 535, 539-540 (D. Minn.); *In re Caroni*, 13 F. 2d 954 (N. D. Calif.); *In re Ross*, 188 Fed. 685 (M. D. Pa.).

Furthermore, during the first four months of the five year period preceding the filing of his petition for naturalization, which commenced November 6, 1914, petitioner was actually incarcerated under the judgment of conviction for forgery, and for at least the next six months, or until September 3, 1915, he was under parole restraint (R. 53; see p. 5, *supra*). As the notation "NCR" plainly indicates, the examination in this regard was concerned with whether petitioner had a criminal record. Hence, even if it be assumed that the examiner's questions were limited to the five year period, petitioner is in no better position. For his imprisonment and parole manifestly constituted part of his criminal record, and he would have been bound, even under such limited questioning, to disclose those facts.

2. Petitioner also contends (Pet. 13–17) that the evidence is insufficient to support the revocation of his naturalization on the ground that it had been illegally procured. The court below did not pass upon this question, stating that the proof "appears to us to be quite finely drawn" (R. 65). We think that the proof on this issue is sufficient and that the court's remark was an inadvertence based upon the erroneous assump-

tions that it had been conceded that the witness Stump knew petitioner for more than five years prior to the filing of the petition for naturalization and that the illegality charged and found consisted of the fact that Stump was not qualified merely because he did not know that petitioner had been incarcerated during the early part of that period.

The statute, pp. 2–3, *supra,* prescribed as conditions for naturalization, *inter alia,* that the applicant's good moral character and continuous residence in the United States during the preceding five years be verified by the testimony of at least two witnesses. Naturalization procured without fulfilling the prescribed conditions may be revoked on the ground that it was illegally obtained. *United States* v. *Ginsberg,* 243 U. S. 472, 475; *United States* v. *Beda,* 118 F. 2d 458 (C. C. A. 2); *Schwinn* v. *United States,* 112 F. 2d 74 (C. C. C. 9), affirmed, 311 U. S. 616; cf. *Baumgartner* v. *United States,* 322 U. S. 665, 675. While a witness is not disqualified merely because he has not observed the applicant on each day during the five year period (*In re Reichenburg,* 238 Fed. 859 (M. D. Pa.)), it has been held that if he had no opportunity to know the applicant's behavior during a continuous period of six months within the five year period, he is not qualified as a witness. *In re Zenzola,* 43 F. 2d 648, 650 (E. D. Mich.).

The district court's conclusion that petitioner's naturalization had been illegally obtained was based upon its finding that Stump was not qualified to testify as to petitioner's residence and good moral character during the whole of the critical five year period (R. 54–55, 56–57, 58). Stump testified at the trial below that he saw petitioner twice in the middle of 1913 and then did not see him again until July 1915 (p. 6, *supra*). Petitioner was in the reformatory from September 1913 until March 1915, and he was on parole until at least September 1915. Stump testified that he had no knowledge of these facts until after he had appeared as a witness to petitioner's application for naturalization (R. 28). A requisite of Stump's qualification as a witness was that he must have known of petitioner's moral character and continuous residence in this country from November 6, 1914, to November 6, 1919, the five years preceding the application. However, his acquaintance with petitioner did not really begin until July 1915, and, therefore, extended over a period considerably less than the required five years. But even if it began in 1913, it was interrupted at least from September 1913 to March 1915, when petitioner was in the reformatory, a fact which did not come to Stump's attention until after he had vouched for petitioner's good moral character on November 6, 1919. It is thus clear that on any view of the

evidence, Stump was not qualified to testify that petitioner had resided continuously in the United States and behaved as a person of good moral character during the whole of the five years preceding his petition for naturalization.

Petitioner's argument to the contrary is, we submit, without merit. He urges (Pet. 17) that the mere fact that Stump did not see him during the first eight or nine months of the five year period, did not disqualify Stump as a witness, in view of the fact that he had met Stump earlier. But since the earlier acquaintance consisted of but two meetings with petitioner in 1913, followed by a complete absence of further contact for two years, the only conclusion that can be drawn was the one made by the district court, i. e., that Stump first became sufficiently well acquainted with petitioner to testify to his moral character and residence in 1915 at the earliest (Finding 36; R. 55).

Petitioner also argues (Pet. 17–22) that the fact that he was imprisoned in a reformatory during the early part of the five year period does not of itself prove that he was not a person of good moral character during the period of his imprisonment and that Stump was therefore not disqualified merely because he did not know of petitioner's imprisonment. The argument rests upon a misconception of the district court's findings and conclusions. The court's finding that Stump was

not sufficiently well acquainted with petitioner to testify as to his moral character and residence during the whole of the five year period was based upon the subsidiary findings that Stump did not see petitioner from June 1913 until July or August 1915 and did not even know that petitioner had been imprisoned during part of that time (R. 54–55). In its conclusions of law on this matter, and also in its opinion, the court did hold that petitioner could not be deemed to have behaved as a person of good moral character within the contemplation of the naturalization law during the periods of his imprisonment and parole and that therefore Stump could not have verified that petitioner was qualified in this respect during the whole of the five year period even if he had known of the imprisonment and parole. But in other respects the opinion and conclusions follow the pattern of the findings, i. e., that Stump had not seen or heard of petitioner during a substantial portion of the five year period and was for that reason alone not a qualified witness. (R. 48–49, 56–57). In any event, as the district court pointed out in its opinion and conclusions (R. 49, 57), imprisonment or parole for a felony during part of the five year period disqualifies a person from presently procuring citizenship, and, by the same token, a witness who knows of such facts, since good behavior under such compulsion

is not the type of behavior contemplated by the statute. *In re McNeil,* 14 F. Supp. 394 (N. D. Calif.).[2]

CONCLUSION

The evidence is under the applicable standards sufficient to support the judgment revoking petitioner's naturalization. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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JUNE 1945.

[2] The dictum from *In re Di Clerico*, 158 Fed. 905, 907 (E. D. N. Y.), quoted by petitioner (Pet. 21–22), is not to the contrary, for it is not clear from that opinion whether the court was speaking of imprisonment before or during the five year period. Moreover, the court stated that a disqualification on the ground that the applicant has committed a crime could not be removed and the statutory period commence to run until the opportunity arises to observe whether the applicant has repented and undergone a reformation of character. On that basis the court denied the petitioner's application for leave to file a petition for naturalization until the lapse of five years from the date he had ceased to use a certificate of naturalization which he had previously procured illegally. Thus, the holding of the case is entirely consistent with the *McNeil* decision, *supra*, and the alternative basis of the district court's decision in respect of Stump's qualification as a witness.

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